

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT WAYNE BLACKBURN,

Plaintiff and Appellant,

v.

VIRGINIA HEROLD, as Executive
Officer, etc., et al.,

Defendants and Respondents.

G055240

(Super. Ct. No. 30-2015-00807759)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Walter P. Schwarm, Judge. Affirmed.

Zeiler Law Group and Kerry P. Zeiler for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Linda K. Schneider, Assistant Attorney General, Gregory J. Salute and Rita M. Lane, Deputy Attorneys General, for Defendants and Respondents.

*

*

*

INTRODUCTION

The California Board of Pharmacy (the Board) revoked the pharmacist license of Robert Wayne Blackburn. Blackburn filed a petition for writ of mandate in the trial court *after* the expiration of the applicable statute of limitations. (Gov. Code, § 11523.) For that reason, the trial court denied the petition.

On appeal, Blackburn argues that the Government Code statute of limitations does not apply because the Board lacked jurisdiction to impose discipline against him. Substantial evidence supported the trial court's denial of the petition for writ of mandate; we therefore affirm the trial court's judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I.

PREVIOUS DISCIPLINARY ACTIONS

A.

Case No. 2421

The Board of Pharmacy issued a pharmacist's license to Blackburn in April 1990. The executive officer of the Board (Complainant)¹ initiated a disciplinary action against Blackburn in February 2003, alleging violations of Business and Professions Code sections 4300 and 4301 (case No. 2421). In September 2003, the Board revoked Blackburn's license, stayed the revocation, and placed Blackburn on probation for three years with terms and conditions.

Blackburn filed a petition for writ of mandate. The trial court granted the petition as to four of the five causes for discipline alleged in case No. 2421. As to the fifth cause for discipline, Blackburn appealed the denial of the petition to this court.

¹ At the time case Nos. 2421 and 2784 were instituted, Patricia Harris was the Board's executive officer. At the time the remaining cases were instituted, Virginia Herold was the Board's executive officer. We will refer to both Harris and Herold as Complainant.

Another panel of this court reversed with directions to enter a judgment issuing the writ. (*Blackburn v. California Board of Pharmacy* (Dec. 20, 2006, G036111 [nonpub. opn.])²

B.

Case No. 2784

Complainant filed another disciplinary action against Blackburn in February 2006, again alleging violations of Business and Professions Code sections 4300 and 4301, and alleging violations of Blackburn's probation in case No. 2421 (case No. 2784). Blackburn signed a stipulated settlement and disciplinary order to resolve the matter, which the Board adopted. The Board then issued an order and decision revoking Blackburn's license, staying the revocation, and placing Blackburn on probation for three years. One of the terms of the stipulated order was that Blackburn reimburse the Board \$49,078 for the costs of investigation and prosecution. Blackburn failed to pay off the cost award before his probation expired, and by the terms of the settlement, the probation was automatically extended.

In February 2010, Blackburn filed a petition for early termination of probation, requesting that the Board waive the remaining balance of \$46,328 in costs from case No. 2784. The Board did not find good cause to waive the balance. The Board concluded that Blackburn waived his right to object to the costs of the investigation and prosecution by admitting the amount as part of the settlement of case No. 2784.

² Our unpublished opinion and the amended judgment that our opinion directed the trial court to enter were the subject of significant motion practice before this court. Neither was a part of the record before the trial court in the present case, and respondents argued they were not appropriate subjects for augmentation or judicial notice. We agreed with respondents on the first point, but disagreed on the second. These documents are, respectively, the decisional law of this state and a record of a court of this state, and therefore are matters of which judicial notice is proper, and even required as to our opinion. (Evid. Code, §§ 451, subd. (a), 452, subd. (d)(1).)

C.

Case No. 4015

In December 2011, Complainant filed still another disciplinary action seeking to revoke Blackburn's probation in case No. 2784, and seeking to revoke his license (case No. 4015). At the time of the administrative hearing in case No. 4015, the Board and Blackburn reached a settlement, which they placed on the record. Blackburn, however, refused to sign a formal stipulation, and the Board filed a motion to enforce the settlement. The motion was granted, Blackburn's license was revoked, the revocation was stayed, and Blackburn was placed on probation for four years.

II.

THE PRESENT DISCIPLINARY ACTION—CASE NO. 5211

In July 2014, Complainant filed another petition to revoke Blackburn's probation and revoke his license (case No. 5211). The administrative law judge (ALJ) issued a proposed decision in April 2015, following a contested evidentiary hearing, vacating the stay of revocation and revoking Blackburn's pharmacist license. On May 20, 2015, the Board adopted the ALJ's decision.

Blackburn filed a petition for writ of mandate and/or prohibition on September 2, 2015. Following briefing and a hearing, the trial court denied the petition. Judgment was entered May 19, 2017, and notice of entry of judgment was served on May 25, 2017. Blackburn timely filed a notice of appeal.

DISCUSSION

The trial court independently reviewed the administrative record in reaching its decision, as a fundamental vested right was involved. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) On appeal, we review the record to determine whether the trial court's judgment is supported by substantial evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824.)

I.

STATUTE OF LIMITATIONS

Government Code section 11523 requires that a petition for writ of mandate challenging decisions issued under the Administrative Procedure Act be filed “within 30 days after the last day on which reconsideration can be ordered.” Government Code section 11523’s rule is strict, but has nevertheless been upheld. “[W]e recognize the hardship that revocation of her license imposes on Hansen, and we are not unsympathetic to her plight. Nevertheless, our Legislature has established strict time deadlines for challenges to administrative decisions, which the courts have a duty to enforce. Because Hansen did not meet those deadlines, she is not entitled to relief.” (*Hansen v. Board of Registered Nursing* (2012) 208 Cal.App.4th 664, 675.)

In its statement of decision, the trial court found: “[T]he order became effective on June 19, 2015, such that the Petition was required to be filed within 30-days thereof, or no later than July 19, 2015. Here, the Petition was filed on September 2, 2015, and is therefore untimely.” The trial court’s recitation of the relevant dates is correct; Blackburn does not disagree. Substantial evidence supports the trial court’s judgment that Blackburn’s petition for writ of mandate was barred by the statute of limitations.

Blackburn does not directly address the applicability of Government Code section 11523. Instead, Blackburn relies on *Miller v. Board of Medical Quality Assurance* (1987) 193 Cal.App.3d 1371, in which the court held: “As a general rule, acts of courts or agencies undertaken wholly without the power to do so may be collaterally attacked at any time without regard to a statute of limitations.” (*Id.* at p. 1379.) Blackburn argues that the Board never had jurisdiction to initiate any of the disciplinary proceedings after case No. 2421, and therefore was without jurisdiction to revoke his license.

The trial court found that Blackburn had failed to establish the order in case No. 5211 was in excess of the Board's jurisdiction. "The Board revoked [Blackburn]'s license under Business and Professions Code section 4300, which granted the Board the right to suspend or revoke [Blackburn]'s license. Specifically, Business and Professions Code section 4300, subdivision (d), provides that the board may initiate disciplinary proceedings to revoke or suspend any probationary certificate of licensure for any violation of the terms and conditions of probation. Here, the Board revoked [Blackburn]'s license after finding that [Blackburn] violated the terms of the probation. The subject probationary order was based on settlement terms reached by the parties and placed on the record on 5-21-13. The subject probationary terms [Blackburn] violated which form the basis of the court's revocation of [Blackburn]'s license w[ere] (1) failure to pay costs; and (2) failure to take 22 hours of ethics course[s] within sixty days of December 6, 2014."

On this point, too, the trial court's judgment was supported by substantial evidence. Blackburn's entire argument rests on his contention that the trial court and this court reversed the discipline imposed on Blackburn in case No. 2421, and that all subsequent disciplinary proceedings sought to punish Blackburn for engaging in the "exact same" or "identical" conduct. Our review of the appellate record makes clear that neither of these factual contentions is correct.

After discipline was imposed against Blackburn in case No. 2421 on five causes for discipline, Blackburn filed a petition for writ of mandate in the trial court. The court granted the petition as to four of the five causes for discipline. Contrary to Blackburn's inference in his appellate brief, that did not end the matter. The petition to revoke probation in case No. 2784 reads, in relevant part, as follows: "[Blackburn] filed a petition for writ of mandate in the Superior Court for the County of Orange that was granted in part and denied in part [as to the discipline imposed in case No. 2421]. Causes for discipline nos. 1-3 and 5 were set aside and the matter remanded to the Board for

reconsideration of the discipline imposed. *After reconsideration, the Board ordered that the original discipline remain undisturbed.*”

After the trial court denied the petition for writ of mandate as to the fifth and final cause of discipline in case No. 2421, Blackburn sought review from this court. In an unpublished decision, this court reversed the trial court’s judgment with directions to enter a new judgment granting the writ of mandate and directing that the Board’s disciplinary decision be vacated. (*Blackburn v. California Board of Pharmacy, supra*, G036111.) The appellate record does not indicate whether the disciplinary charge was dropped or whether, like the other charges, the discipline was ultimately reinstated.

Blackburn’s contention that the subsequent disciplinary actions against him have sought identical discipline against him for identical actions is incorrect. The charge for which this court previously expressed its opinion in connection with case No. 2421 reads: “Respondent Blackburn is subject to disciplinary action pursuant to sections 4300, 4301(j), and 4301(o) of the [Business and Professions] Code on the grounds of unprofessional conduct for violating [Business and Professions Code] section 4160 in that Respondent Blackburn permitted Romdel Pharmacy to act as a wholesaler without first obtaining a wholesale license from the Board of Pharmacy. The circumstances are as follows: From on or around May 10, 1999 through at least March 31, 2000, Romdel Pharmacy acted in the capacity of a wholesaler by selling dangerous drugs to Northern Nevada Pharmaceutical at a time when Romdel Pharmacy did not possess a valid wholesale license issued by the Board of Pharmacy.”

Case No. 2784 also involved a cause for discipline against Blackburn acting as a wholesaler without a license, but the factual underpinnings of the charge were wholly different than those in case No. 2421. In case No. 2784, the Board alleged IHA, a corporation wholly owned by Blackburn, contracted to manage a hospital’s on-site pharmacy. The Board further alleged IHA ordered more drugs than the hospital needed, and sold the excess to third parties. Blackburn’s alleged wholesaling conduct violating

the Business and Professions Code in case No. 2421 is not the same as the alleged wholesaling conduct in case No. 2784. Case No. 5211 does not address any alleged violation based on wholesaling; that case is based on Blackburn's failure to pay the costs to which he stipulated as a term of probation in an earlier proceeding.

Further, our earlier unpublished opinion did not address a statutory change made after case No. 2421 was filed. There we explained: "After oral argument, this court delayed submission of the cause to receive additional briefing on the subject of to what degree, if any, did certain legislation in 2004 indicate that Blackburn's conduct in 1999 did not give rise to a cause for discipline. Both sides presented excellent legislative history of that legislation (SB 1307 (2003-2004 reg. session)), which was originally proposed by the board itself. Clearly the 2004 legislation was intended to prevent the evil of institutional pharmacies arbitraging their stock by obtaining drugs from manufacturers on discount (because of their captive market, such as a nursing facility) and then selling to wholesalers at a significant profit, a process which makes drugs very hard to trace. While our opinion today ultimately rests on what the Legislature intended when it wrote [Business and Professions Code] section 4113, subdivision (b), a statute that is the same today as it was in 1999, we do not opine on the degree to which the 2004 legislation (and perhaps ensuing regulations) may have increased the responsibilities of pharmacists-in-charge for their pharmacy's compliance with laws *beyond* those involving the 'practice of pharmacy,' i.e., involving pharmaceutical wholesaling." (*Blackburn v. California Board of Pharmacy, supra*, G036111.) Thus, even if the violations of which Blackburn was charged in case No. 2421 were the same violations as those he was charged with in later cases, it would not mean per se that the Board was prohibited from pursuing them anew.

II.

VIOLATION OF DUE PROCESS RIGHTS

Blackburn also argues that the Board violated his due process rights by failing to advise the ALJ that the trial court and this court had (1) set aside the discipline in case No. 2421 and (2) decided the Board lacked jurisdiction to pursue charges against Blackburn in that case. At the administrative hearing in case No. 5211, Blackburn testified: “I’ve been on probation since the year 2000 and it started with a case that was alluded to earlier, a [Romdel] case, where I was inappropriately accused of several different things by accusations and so they started my probation as of the year 2000. [¶] The case finally came to fruition in [the] year 2003 in which I . . . *appealed it to the Superior Court, overturned four of the five accusations in the Superior Court, and overturned the final accusation in the Appeals Court*, so theoretically, I should [not] have been on probation for those three years, but I was on probation and never got credit for that period of time.” (Italics added.) In that same hearing, Blackburn testified: “2421. That case cost me a hundred thousand dollars and *I took it to the Superior Court and the Appeals Court and I overturned all the accusations*, so—and that’s been wiped off the website. I don’t know why. I guess after a certain number of years, they wipe it off, so *I was clear of any guilt in it on any of those accusations*, but I never see—the only credit I received was a dollar amount credit. I didn’t get credit for being off probation.” (Italics added.) The Board did not dispute this testimony. The ultimate results of case No. 2421 were before the ALJ.

Further, the ALJ’s decision in case No. 5211 was based on Blackburn’s violation of probation terms and conditions to which Blackburn stipulated in case Nos. 2784 and 4015. The ALJ’s decision was *not* based on the discipline imposed on Blackburn in case No. 2421. Therefore, any alleged failure to advise the ALJ that the discipline imposed in case No. 2421 was overturned was irrelevant. The trial court’s judgment was supported by substantial evidence on this point.

III.

UNCONSTITUTIONALITY OF MAKING COSTS OF ENFORCEMENT A TERM OF PROBATION

The trial court found that Blackburn waived any challenge to the reasonableness of the probationary terms by entering the stipulation and settlement agreements in case Nos. 2784 and 4015. The court also found that any challenge to the underlying probation terms was time-barred. (Gov. Code, § 11523.) This judgment was also supported by substantial evidence.

The stipulated settlement and disciplinary order in case No. 2784 reads in relevant part as follows: “[Blackburn] has carefully read, and understands the charges and Allegations in accusation [case] No. 2784. [Blackburn] has also carefully read, and understands the effects of this Stipulated Settlement and Disciplinary Order. [¶] . . . [Blackburn] is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws. [¶] . . . [Blackburn] voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.” As is relevant to this appeal, the stipulated order includes the following as a term and condition of probation: “[Blackburn] shall pay to the Board its costs of investigation and prosecution of this matter in the amount of \$49,078.00. This amount reflects an offset of \$6,744, which represents reimbursement of the costs of investigation and enforcement [Blackburn] previously paid pursuant to Board of Pharmacy Case No. 2421. [Blackburn] shall make said payments in a payment plan approved by the Board. [¶] The filing of bankruptcy by

[Blackburn] shall not relieve [Blackburn] of his responsibility to reimburse the Board its costs of investigation and prosecution.”

The stipulated order also includes the following language regarding violation of probation: “If [Blackburn] violates probation in any respect, the Board, after giving [Blackburn] notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If an Accusation . . . is filed against [Blackburn] during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended, until the Accusation . . . is heard and decided. [¶] If [Blackburn] has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over [Blackburn], and probation shall automatically be extended until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty which was stayed.” Blackburn’s signature appears immediately under the following paragraph: “Acceptance [¶] I have carefully read the Stipulated Settlement and Disciplinary Order. I understand the stipulation and the effect it will have on my Pharmacist License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board of Pharmacy.” At the administrative hearing in case No. 5211, Blackburn admitted he had stipulated to the probation conditions of reimbursing the Board in case No. 2784.

In case No. 4015, the order on the motion to enforce the settlement found that Blackburn had stipulated to a settlement of the disciplinary matter on condition of the following probation condition, among others: “As a condition precedent to successful completion of probation, [Blackburn] shall pay to the Board its costs of investigation and prosecution in the amount of \$44,328, pursuant to Case No. 2784, within thirty days of the effective date of this decision. [Blackburn] shall also pay to the Board its costs of investigation and enforcement of the current matter in the amount of \$10,000.

[Blackburn] shall make monthly payments according to a schedule approved by the Board. There shall be no deviation from that schedule absent prior written approval by the Board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation. [¶] Whether the filing of bankruptcy by [Blackburn] relieves [Blackburn] of [his] responsibility to reimburse the Board its costs of investigation and prosecution is a legal matter to be decided by a court of competent jurisdiction.”

California law permits a stipulated settlement to include the recovery of the costs of investigation and enforcement. (Bus. & Prof. Code, § 125.3, subd. (i).) Stipulations for settlement of administrative proceedings are governed by basic contract principles. (*Stermer v. Board of Dental Examiners* (2002) 95 Cal.App.4th 128, 133.) Blackburn does not provide any legal authorities or facts why the payment conditions in the stipulated settlement should not be enforced.

IV.

PROBATION TERMS VIOLATING CONSTITUTIONAL RIGHTS

The trial court found that Blackburn had waived any challenge to the probation terms that he now contends compel his speech and prohibit intrastate travel. Further, the court found that the ALJ did not base its findings of a probation violation on any of the terms that allegedly restrict Blackburn’s constitutional rights. As explained *ante*, Blackburn stipulated to the terms of the settlement order in case No. 2784, and agreed to the terms of the settlement in case No. 4015. The trial court’s judgment was supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.